Office-Supreme Court, U.S.
FILED
JAN 8 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-893

In The

Supreme Court of the United States

October Term, 1984

THE OMEGA CORPORATION OF CHESTERFIELD,
Petitioner,

v.

D. DUANE MALLOY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

Should This Court Grant Certiorari Upon Petitioners' Request Where Petitioners Failed To Discuss Or Expressly Reserve The Question Of A Denial Of Equal Protection Before The Supreme Court Of Virginia

Or

When The Decision Of The Supreme Court Of Virginia Was Based Upon Adequate State Grounds And No Substantial Federal Question Is Presented?

TABLE OF CONTENTS

	Pages
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	ii
Opinions and Orders Below	1
Jurisdiction	2
Statement of the Case	2
Reasons for Denying the Writ:	
I. The Court Should Deny The Petition Since The Petitioner Failed To Discuss Or Expressly Reserve At Oral Argument Its Contention That The Trial Court's Injunctions Resulted In A Denial Of Equal Protection Because They Discriminate Against Unrelated Persons And Those Who Are Mentally Retarded	4
II. The Petition Should Not Be Granted Because The Judgment Of The State Court Rests On Adequate And Independent State Grounds	5
III. The Petition Should Not Be Granted Because It Is Not A Denial Of Equal Protection For A State Court To Enforce A Single-Family Deed Restriction So As To Deny The Construction And Operation Of A Facility For Four Mentally Retarded Persons Living With Counselors	7
Conclusion	9

TABLE OF AUTHORITIES

Cases:	Pages
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	6
Cleburne Living Center v. City of Cleburne, Tex., 726 F. 2d 191 (5th Cir. 1984) Cert. granted 53 U.S.L.W. 3355 (U.S. November 13, 1984) (No. 84-408)	7, 8

TABLE OF AUTHORITIES—Continued

Pages

Herb v. Pitcairn, 324 U.S. 117 (1954) 5, 6

Shelley v. Kraemer, 334 U.S. 1 (1948) 8

Stembridge v. Georgia, 343 U.S. 541 (1952) 6

Stevens v. Ford Motor Co., 226 Va. 415, 309 S.E. 2d 319 (1983) 4

University of California Regents v. Bakke, 438 U.S. 265 (1978) 8

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 17 2

CONSTITUTION

United States Constitution, Amendment XIV 3, 5, 8

STATUTES

28 U.S.C. § 1257(3) 2

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OPINIONS AND ORDERS BELOW

Respondents accept Petitioners' statement of the applicable opinions and orders below and incorporate same by reference.

JURISDICTION

Respondents deny that this Court has jurisdiction because the Petitioner's petition for a Writ of Certiorari contains none of the reasons set forth in Rule 17 of the Rules of the United States Supreme Court nor does the petition allege a question concerning the validity of a State statute on the ground that it is repugnant to the Constitution of the United States. 28 U.S.C. § 1257(3). There is no Constitutional provision involved.

———o———

STATEMENT OF THE CASE

The Omega Corporation of Chesterfield ("Omega") is a non-stock, non-profit Virginia Corporation, which owns a lot in Scottingham Subdivision and a lot in Providence Pines Subdivision in Chesterfield County, Virginia. Omega proposes to build homes to house four mentally retarded adults with 24 hour supervision provided by counselors employed by Chesterfield Mental Retardation Services, Inc. The four mentally retarded adults would not be able to come and go from the residence in either subdivision as they pleased, but only with the consent and supervision of a counselor. Upon learning of the plans of Omega to construct these group homes in their subdivisions, 31 homeowners of the Scottingham subdivision, Section 8, and 22 homeowners from Providence Pines subdivision filed Bills of Complaint in the Circuit Court of Chesterfield County, Virginia, to enjoin the construction and operation of the group homes.

The most casual reading of the trial court's memorandum of opinion alerts one that, contrary to the repre-

sentations of the petitioner, the trial judge did not adopt Omega's proposed findings of fact. The trial court adopted Omega's proposed findings of fact and additional findings and facts from testimony given at the trial. Pet. App. at 38a. Many of the proposed findings of facts were contradicted by testimony at the trial, including oral testimony as well as exhibits accepted as evidence. This is obvious from the decision of the trial court.

The petitioner has listed in its trial brief and its written brief before the Virginia Supreme Court its argument that denial of group homes in the two subdivisions would constitute a "flagrant" denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. The petitioner, however, made no such argument before the trial court or the Virginia Supreme Court. Neither the trial court nor the Virginia Supreme Court considered the equal protection argument in making their decisions.

The trial court's opinion plainly shows that the trial court's decision was based upon contract and property laws of the Commonwealth of Virginia without considering any Federal rights. Pet. App. at 38a.

The opinion of the Virginia Supreme Court again clearly expresses a decision based upon the interpretation of state laws and involves no decision concerning Federal rights. Pet. App. at 1a. In addition, Chief Justice Harry L. Carrico, who was joined in the majority opinion by the five next senior members of the Court, stated clearly that the argument by the petitioner of a denial of equal protection was waived. Pet. App. at 20a.

> On brief, Omega argued that the chancellor's injunctions result in a denial of equal protection because

> they discriminate against unrelated persons and those who are mentally retarded. This point, however, was neither discussed nor expressly reserved at oral arguments; hence, we consider the point waived. *Stevens v. Ford Motor Co.*, 226 Va. 415, 417n., 309 S.E. 2d 319, 320n.(1983).

No appellate court will allow an attorney to take a "shotgun" approach in his or her brief just in case the important points the attorney pursues are not successful. Not only is this a well-known rule of appellate procedure, but it had been specifically pronounced by the Virginia Supreme Court in four of its decisions since 1980. The Virginia Supreme Court properly found that petitioner had waived the argument concerning equal protection.

The dissenting opinion upon which the petitioner completely relies was written by the junior Justice without a concurrence by a single Justice. The petitioner, would have you believe that the dissenting opinion is the controlling law in the Commonwealth of Virginia. I submit to this Court that this case was properly decided upon Virginia Law. No federal rules or rights were at issue before the Virginia Supreme Court.

REASONS FOR DENYING THE WRIT

I. The Court Should Deny The Petition Since The Petitioner Failed To Discuss Or Expressly Reserve At Oral Argument Its Contention That The Trial Court's Injunctions Resulted In A Denial Of Equal Protection Because They Discriminate Against Unrelated Persons And Those Who Are Mentally Retarded.

Since the petitioner did not present the argument of equal protection before the two State Courts, it cannot

present the argument before the United States Supreme Court.

Certainly if the petitioner had felt that the restrictive covenants of the two subdivisions when enforced by the State Court caused a denial of equal protection of the law for four mentally retarded persons living with counselors, then surely petitioner would have argued, emphasized and preserved this point before the trial court and the Virginia Supreme Court. It is clear from its presentation of its case that the petitioner knew the trial court and the Virginia Supreme Court were to determine the issue of enforceability of the restrictive covenants based on state contract and property laws, and that the Constitutional question of equal protection under the Fourteenth Amendment of the United States Constitution was not an issue before either Court. Since petitioner waived this point before the Virginia Supreme Court, it cannot now raise the point of equal protection before this Court.

II. The Petition Should Not Be Granted Because The Judgment Of The State Court Rests On Adequate And Independent State Grounds.

The United States Supreme Court has consistently held that it would not review judgments of State Courts that rest on adequate and independent state grounds. In the case of *Herb v. Pitcairn,* 324 U.S. 117, 125 (1954), the Court stated:

> This Court from the time of its foundation has adhered to the principal that it will not review judgments of State Courts that rest on adequate and independent grounds . . . Our only power over State judgments is to correct them to the extent that they incorrectly ad-

> judge federal rights and our power is to correct wrong judgments, not to revise opinions.

This Court has held that in order to review the decision of a State Court, it must appear that the federal question was decided and that its decision was essential to the disposition of the case. This Court has gone so far as to say where it is not clear whether the judgment rests on a federal ground or adequate State one, the Court will not review the State decision. (*Herb v. Pitcairn* supra).

Nothing could be clearer than the decision, written by Chief Justice Carrico of the Virginia Supreme Court, that this case was decided by that State Court on adequate and independent state grounds. The opinion does not discuss any federal question, right or rule. It judiciously discusses the decisions of the Virginia Supreme Court and reaches a conclusion that is consistent with the prior decisions of that Court. The very essence of an Appellate Court is to make decisions consistent with its precedents giving order to society.

Surely this Court cannot consider the appeal presented to it by the petitioner when it has previously stated that

> We are without jurisdiction when the question of the existence of an adequate state ground is debatable. Even when the highest Court of a State delivers no opinion, and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. *Stembridge v. Georgia,* 343 U.S. 541, 547 (1952).

In the case of *Black v. Cutter Laboratories,* 351 U.S. 292, 299 (1956) this Court stated that

As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented. Moreover, even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a Constitutional question.

III. The Petition Should Not Be Granted Because It Is Not A Denial Of Equal Protection For A State Court To Enforce A Single-Family Deed Restriction So As To Deny The Construction And Operation Of A Facility For Four Mentally Retarded Persons Living With Counselors.

Nowhere in the restrictive covenants interpreted by the trial court and the Virginia Supreme Court is there a prohibition against mentally retarded adults. Petitioner has chosen to continue to ignore this fact in its arguments before the Court. There is nothing in the restrictive covenants of either subdivision which would prevent mentally retarded adults from living in these subdivisions. The restrictive covenants simply prevent the construction and operation of a facility such as the one proposed by Omega. The finding by the State Courts that such a facility is different from a single-family residence is so obvious that it needs no amplification. The residents of the proposed facility would neither be landowners nor tenants under executed leases. They would not be free to come and go as they please. They would not be living in the residence with the permanency of normal residential dwellings. These are merely a few of the differences between the facility proposed by Omega and a single-family dwelling envisioned by the other homeowners in the subdivisions.

The case of *Cleburne Living Center v. City of Cleburne, Tex.*, 726 F. 2d 191 (5th Cir. 1984) *Cert. granted,*

53 U.S.L.W. 3355 (U.S. November 13, 1984) No. 84-468, which is relied upon so heavily by the petitioner, is clearly distinguishable from this case. In the *Cleburne* case, the Court was confronted with a city zoning ordinance. The zoning ordinance interpreted by the Court in the *Cleburne* case is clearly exclusionary. It specifically excludes a class of people from enjoying property under a specific zoning classification. There is no exclusionary law or ordinance before this Court in the present case.

While the petitioner has abandoned several of its cases previously cited, it continues to cite *Shelley v. Kraemer*, 334 U.S. 1, 17-18, (1948). The *Shelley* case interpreted a restrictive covenant forbidding non-caucasians to own and inhabit property in subdivisions. This again was an exclusionary restrictive covenant that violated the very essence of the Fourteenth Amendment which was adopted to free all Americans. The restrictive covenants now before this Court do not exclude anyone who wishes to live in a single-family dwelling. The purpose for which Omega wishes to use the lots purchased by it is for a facility, not a single-family dwelling. The mental capacity of the inhabitants of the proposed group homes had and has absolutely nothing to do with the decision of the Virginia Courts. The Courts simply found that the proposed use by the Omega Corporation resulted in the creation of a facility and not a single-family dwelling under the reasonable interpretation of the restrictive covenants.

Instead of equal protection, the petitioner would have this Court as it unsuccessfully urged upon the Virginia Supreme Court, create a decision of preference. Mr. Justice Powell in his opinion in *University of California Re-*

gents v. Bakke, 438 U.S. 265, 293-98 (1978) expresses the concern of this Court when he addresses the "serious problems of justice connected with the idea of preference itself."

CONCLUSION

Inasmuch as the equal protection argument presented in the petition was waived before the Virginia Supreme Court, that the decision of the Virginia Supreme Court was founded upon independent and adequate state grounds and the decision does not deny either the petitioner or mentally retarded persons equal protection under the law, the petition for writ of certiorari to review the judgment and opinion of the Virginia Supreme Court should be denied.

Respectfully submitted,

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